

SEARCH AND SEIZURE: Smell of marijuana on a person as furnishing reasonable suspicion for a stop and/or probable cause for a search.....Revised 12/2009

An officer's smelling marijuana on a person, without more, is insufficient to give the officer probable cause to search the person, but may furnish enough reasonable suspicion to justify a *Terry* stop and frisk, *State v. Valle*, 196 Ariz. 324 (App. 2000), or to search a vehicle. *State v. Harrison*, 111 Ariz. 508 (1975).

"Probable cause may arise from use of an officer's senses," *State v. Valenzuela*, 121 Ariz. 274, 275, 589 P.2d 1306, 1307 (1979), including the officer's sense of smell. The odor of marijuana on a person may furnish enough reasonable suspicion to justify a police officer in making a *Terry*¹ stop and pat-down of an individual. But the odor of marijuana on a person², without more, does not constitute probable cause to search that person. In *State v. Valle*, 196 Ariz. 324, 996 P.2d 125 (App. 2000), an officer stopped a car for vehicle

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² The odor of marijuana coming from a *vehicle*, however, may provide probable cause for a search of the *vehicle*, due to the lower standard needed to justify a vehicle search than a search of a person. See, e.g., *State v. Tykwinski*, 170 Ariz. 365, 367, 824 P.2d 761, 763 (App. 1991): "It is conceded that once Officer Long smelled the marijuana, probable cause existed to search the appellants and the vehicle." Also note that if the police had had probable cause to arrest the driver, the search could have been justified as a search incident to arrest and/or as an inventory search.

Further, the smell of burning marijuana coming from a house or hotel room will give an officer probable cause to believe that someone inside is smoking marijuana. See *State v. Kosman*, 181 Ariz. 487, 491, 892 P.2d 207, 211 (App. 1995), discussing *State v. Decker*, 119 Ariz. 195, 197-98, 580 P.2d 333, 335-36 (1978).

equipment violations. Valle, the driver, smelled of marijuana, and one of the passengers in the car was carrying a large amount of marijuana. After asking for Valle's driver's license and having him step out of the car, the officer asked him if he was carrying any marijuana or contraband. Valle said he was not. The officer then conducted a "pat-down" search of his person and felt something in his pocket. "The object did not feel like a weapon or other metal object, and nothing in the record suggests that, by touching the object through Defendant's clothing, [the officer] knew that it was contraband." *Id.* at 326, ¶ 4, 996 P.2d at 127. The officer then reached into Valle's pocket and found a pack of rolling papers. After completing the pat-down, the officer asked Valle to remove his shoes and found a small bag of marijuana.

The Court of Appeals held in *Valle* that the marijuana and rolling papers had to be suppressed because the officer exceeded the permissible bounds of a *Terry* stop and pat-down, first when he reached into Valle's pocket and again when he had him remove his shoes. A *Terry* frisk is limited to checking a suspect for items that could be weapons or are immediately identifiable by touch as contraband (the "plain feel" exception³). *Id.* at 327, ¶ 10, 996 P.2d at 128. Once the officer had determined that Valle was not carrying any weapon or immediately-obvious contraband, the officer had to stop the pat-down and could not search further.

³ See *Pima County Juv. Action No. J-103621-01*, 181 Ariz. 375, 378, 891 P.2d 243, 246 (App. 1995), citing *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

The Court rejected the State's argument that Valle's known gang affiliation justified the search, saying that the State had not presented evidence that gang activity was correlated with marijuana use. The Court also rejected the State's arguments that the odor of marijuana on Valle's person and the fact that the officer had found marijuana on Valle's passenger furnished probable cause for a search and/or arrest of Valle. The Court said:

Certainly the odor of marijuana on a person may contribute to probable cause to believe that that person has used or possessed marijuana.⁴ This factor alone, however, was insufficient in this case to give rise to probable cause. Here, the odor of marijuana on Defendant's person was not the only fact known to [the officer]. He was also aware that Defendant's passenger possessed marijuana. These two factors provide the sole basis for any claim of probable cause to arrest Defendant.

Although we recognize that probable cause is a practical, non-technical concept, we are not convinced that these two factors, without other credible indicia of criminal activity, were sufficient to convince a reasonable and prudent person that Defendant possessed marijuana.

Id. at 330-331, ¶ 24-25, 996 P.2d at 131-132 [internal quotation marks and citations omitted].

An officer who smells the odor of marijuana coming from a car has probable cause to search the car, including the trunk. *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143 (1975). Additionally, an officer has probable

⁴ For example, in *State v. Valenzuela*, 121 Ariz. 274, 589 P.2d 1306 (1979), an officer smelled a strong odor of marijuana on the defendant's person and a large bulge in his front pants pocket. The officer saw him put his hand in his front pants pocket. When the officer asked what he had in his pocket, he answered, "Nothing." This obviously false answer, added to the smell and the fact that he put his hand in his pocket, gave the officer probable cause to reach into the pocket.

cause to arrest the driver after smelling the odor of marijuana in the car, if there is only one person in the car. *Id.* If more than one person is in the car, the officer has only reasonable suspicion to suspect each individual.